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NOTE

From :	General Secretariat
To :	Working Party on Information
Subject :	Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents

Delegations will find at Annex a non paper drafted by the Commission services which was circulated at the meeting of the Working Party on 16 December 2008:

NON PAPER

EXPLANATORY NOTES

Commission proposal for the recast of Regulation 1049/2001

1. ARTICLE 2(5)

This Regulation shall not apply to documents submitted to Courts by parties other than the institutions.

1.1. Purpose

This provision clarifies the relationship between Regulation 1049/2001 and the rules of the Statute of the Court of Justice regarding access to case files.

1.2. Rules of the Court

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, which also applies to the Court of First Instance, written submissions are only communicated to the other parties and to the institutions whose decisions are in dispute. According to the Instructions to the Registrar of the Court of First Instance, access to documents in a case file may be granted to a third party on duly substantiated grounds. Such a right of access is based on the specific interest of a third party and differs substantially from the public right of access.

Regulation 1049/2001 does not apply to the European Courts. Therefore, there are no rules governing access to case files of the Courts other than the Statute of the Court of Justice and the Rules of Procedure and the Instructions to the Registrar.

If the Commission were to disclose submissions to the Courts, it would circumvent the Courts' own rules. The Protocol on the Statute of the Court of Justice is an integral part of the Treaty establishing the European Community which can only be modified by the Council acting unanimously pursuant to the procedure foreseen in Article 245 EC. Therefore, Regulation 1049/2001 cannot derogate to the Statute of the Court.

In its judgment of 12 September 2007 in case T-36/04, *Association de la Presse Internationale v Commission*, the Court of First Instance, based on an order of the Court of Justice[1], has only stated that the Rules of Procedure and the Instructions to the Registrar do not prevent parties to disclose <u>their</u>

[1] Case C-376/98 Germany v Parliament and Council [2000] ECR I-2247, paragraph 10.

own submissions. The Court did not address the issue whether institutions should grant access to submissions other than their own.

For these reasons, the Commission wishes to clarify that written submissions to the European Courts other than the institutions' own submissions do not fall within the scope of Regulation 1049/2001.

2. ARTICLE 2(6) FIRST SENTENCE

Without prejudice to specific rights of access for interested parties established by EC law, documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope shall not be accessible to the public until the investigation has been closed or the act has become definitive.

2.1. Purpose

This provision creates a temporary exclusion form the public right of access with regard to documents drawn up or received:

- as part of ongoing investigative proceedings, or
- in the framework of the adoption of an act of individual scope[2].

It aims at protecting the proceedings in official investigations carried out by the institution, such as infringement proceedings, competition law enforcement, OLAF investigations, disciplinary investigations in staff matters as well as procedures concerning the adoption of binding acts which are not of general application, i.e. individual decisions in the sense of Article 249 EC.

2.2. Rights of persons concerned by the procedure (investigation or decision)

In many cases persons concerned by the procedure have a right of access to the file or a right to be heard by virtue of their rights of defence. Such rights, which are either conferred by specific provisions or recognised by the case-law, and usually based on overriding principles of law, remain unaffected by Regulation 1049/2001.

2.3. Transparency

In many areas, specific legislation contains provisions on what has to be published or otherwise made public by the institution – ex. decisions on competition matters, State aides, authorisations for GMOs, for pesticides, etc.). Such legislation will remain unaffected by Article 2(6). Consequently, transparency is in any event ensured by publication of the relevant decision or other information including by other forms of publicity (e.g. via press releases).

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[2] Conversely, acts of general application are not covered by this provision.

2.4. Rationale for temporary exclusion from access by the public

During all these procedures and until the case is closed or the act has become definitive there is a strong public interest for an institution to focus its priority tasks in conducting the relevant investigation or to proceed to adopting the act concerned without being disturbed by the obligation to deal with access to documents. Furthermore, disclosure of documents in a pending investigation would jeopardise the purpose of the investigations.

2.5. Exclusion v. exceptions

Requests in these matters are generally not made for specific individual documents but for all documents or a generically defined large group of documents pertaining to a given file. The application of all the exceptions implies a case-by-case analysis of the documents requested including, where applicable, the consultation of the third parties from which documents originate. This procedure, which often concerns considerable amounts of documents, is hardy compatible with the time constraints and the obligation to deliver results in the main procedure to which the institution is submitted.

On the other hand, practice shows that a case-by-case examination during the procedure does not lead to disclosure of documents with a significant interest for transparency that would justify the administrative burden of an individual assessment of all the documents in the file.

Furthermore, it appears that Regulation 1049/2001 has been used as a means either to circumvent strict rules on privileged access to the file for parties concerned or to obstruct a decision-making process potentially adversely affecting the interests of the applicant.

3. ARTICLE 2(6) SECOND SENTENCE

Documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public.

3.1. Purpose

According to this provision information gathered or obtained from natural or legal persons in the framework of an investigation would be exempt from public access even after the investigation is closed and until the file is opened to the public under the rules on the historical archives (up to 30 years). The term "legal persons" must be understood in the meaning of Article 2(1), i.e. legal persons benefiting from the right of access. It does not include Member States. In practice legal persons subject to investigations will generally be undertakings, associations or private persons.

3.2. Rationale for permanent exclusion from access by the public

The aim of the Commission is to exclude from the scope of the Regulation information obtained from private persons in any form in the context of

investigations that might lead to measures affecting the interests of applied to individuals or undertakings, including sanctions[3].

In such matters the institution has been granted powers of investigation under which private persons can be compelled to cooperate, including obtaining information containing business secrets and other confidential information. Specific legislation foresees limitation of use of the information gathered by the institution in order to balance the protection of the fundamental rights of the persons concerned with the need to enforce EC law.

Exclusion from the scope of Regulation 1049/2001 is not contradictory with the principle of transparency. Indeed, the purpose of the Regulation is, pursuant to Recital (2) *[...] to enable citizens to participate more closely in the decision-making process and guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.*"

The aim of transparency is therefore to ensure accountability of the institution, not of individual persons or undertakings that are or have been investigated, and possibly sanctioned by an institution.

3.3. Exclusion does not include documents of Member States

Member States are not included in the definition of beneficiaries of the right of access in Article 2 which confers such right on "any citizen and any natural or legal person". Consequently, the terms "natural or legal persons" in Article 2(6) do not include Member States. This interpretation is supported by recitals (1), (2) and (6) which focus on the citizen as "the beneficiary" of the right of access[4]. Furthermore, the definition of "third party" under Article 3 only has the purpose of clarifying the procedural rule under Article 4(4) and not to enlarge the scope of the Regulation as regards the beneficiaries of the right of access.

3.4. Exclusion is not incompatible with Aarhus convention

As the Commission explained in section 3.2 of the explanatory memorandum, the exclusion is limited to investigations and to documents received in that context only from persons directly concerned by the investigation procedure (natural or legal persons), its scope in practice is limited, *ratione materiae,* to competition, trade defence matters or fight against fraud (OLAF investigations). The information gathered in such fields of activity does not qualify as "environmental information" in the sense of Aarhus convention and Regulation. Consequently, there is no risk of incompatibility.

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3 Concerning the special need for protection in competition field, see Annex I. Concerning statistics, see annex II. Please note that the number of requests, in most of the cases, concerns access to the whole file and not to documents clearly identified.

4 Confirmed by the Court of Justice in Turco, C-39/05, at para. 34, 45 and 46.

4. RELATIONSHIP BETWEEN ARTICLE 2(6) AND ARTICLE 4(2)(D) EXCEPTION

All the documents relating to an investigation (except information gathered/received from natural or legal persons) or to a decision are subject to the Regulation once the investigation is closed or the decision has been adopted is not longer challengeable.

Why is still there a need for an exception?

The exception "inspections, investigations" may continue to apply even after the specific investigation has been concluded by the institution or the act has become definitive. This is notably the case where the investigation is purely preparatory to other steps by other bodies. This is in particular the case where the institution does not have a decision-making power following such investigation like in infringements under 226/228 EC and OLAF investigations. Consequently, there may be a need for continuing to apply the exception after the investigation has been closed by the institution concerned. In such cases, the exception would need to be interpreted and applied strictly.

ANNEX I

Specificities of competition law:

- The Commission is fully **in favour of transparency**, also in the competition area. It has a long standing tradition of being one of the most transparent competition law enforcement bodies in the world. Green Papers, White Papers and draft legislation are all published on the web-site and generally followed by extensive public consultation procedures. The Commission publishes also all its main decisions under the Competition Regulations, including details of the facts of the cases.
- This being said, **transparency provisions** should not undermine or negatively influence effective competition enforcement. The Commission has built up a strong record of competition enforcement over the years, based on a number of pillars, including those of safeguarding business information and creating trust in its leniency policy. Important cartel cases where leniency applications have played a crucial role include elevators, sanitary ware, flat glass, gas insulated switchgear, rubber chemicals and many ongoing investigations.
- As the Court of First Instance recently confirmed[5], the interest of the public in obtaining documents pursuant to the principle of transparency does not carry the same weight in administrative competition proceedings as it does in legislative proceedings. [*NB: judgment appealed by Sweden*]
- Already under the current Transparency Regulation, many documents in competition investigation files are **not accessible to the public**. The exceptions in Regulation 1049/2001 that are most commonly applicable are those of the **protection of investigations**, the **protection of commercial interests of undertakings** and the **protection of the decision-making process**. These exceptions may in principle apply to pending as well as closed competition files.
- The Commission's Proposal for a new Transparency Regulation **will not change the level of transparency on EU competition issues in practice** because the Commission considers it is already in a position to refuse access to documents on a case-by case basis under the current Regulation 1049 and the Commission in practice also does so.
- **The principal change** of the proposed Regulation would be to make the present process **more efficient** and limit the heavy burden of work which is produced through attempts by parties and law firms to work around established law and procedures on competition cases by filing access to documents requests under Regulation 1049/2001. DG COMP receives many requests for access to documents (in total 460 in 2007, generally concerning the whole file of a procedure), not so much from citizens but rather from lawyers (acting for privately interested parties), as well as academics and civil society.[6] For most of these requests, which can cover numerous documents, one or more of the exceptions of Regulation 1049/2001 is applicable and the document(s) requested can therefore not be made accessible. The present system requires however a lot of administrative work to handle properly all these requests,

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5 Case T-403/05, My Travel v Commission, judgement of 9.9.2008, at para 49.[check]

6 For statistic on the number of access requests to DG COMP for the years 2004-2007 and the origin of access requests for 2006, see Annex II.

which is not a very efficient use of public resources. The proposed Regulation would much better clarify what people can expect to have access to and would therefore substantially reduce unnecessary work both on the public and the private sector.

- Also, increasingly, Regulation 1049/2001 is used by undertakings and their lawyers to circumvent the specific access to file rules in the competition regulations. The proposed regulation would bring an en to those attempts.
- **Additional transparency** (beyond what is already accessible today) on competition investigations would:

  a) have a **chilling effect on the provision of information** by companies to the Commission (i.e. undertakings would be more reluctant to come forward with information in future similar cases). In this regard it should also be kept in mind that the Commission's investigation powers in the competition field are predicated on the assumption, explicitly provided for in the specific legislation, that the Commission uses the information thus gathered for the purpose of EC competition law enforcement only.

  b) significantly affect the **Commission's Leniency Programme** and thus significantly endanger a major weapon in the fight against entrenched hard-core cartels[7]. In cartel investigations voluntary submissions are crucial for the successful conduct and conclusion of investigations. That is why the Commission and the Member States have special provisions for the treatment of that information including oral procedures for collecting such information. However, insufficient safeguards and clarity exist for companies as to the use of their submissions outside the sphere of the investigation, voluntary cooperation will dry up. It is furthermore noted that in reality, it is often not evident if information provided is ultimately based on or related to voluntary submissions, so that as regards the influence on incentives for cooperation the same aspects as noted under a) above kick in.

  - This would seriously undermine an effective EC competition enforcement. DG COMP runs **many competition investigations.** To illustrate this: including cases that are under appeal and being monitored, DG COMP has about 260 open antitrust cases, about 190 merger cases and about 1220 open State aid cases. The core activity of DG COMP is to run these investigations. A parallel deep assessment and reasoning of wide requests to documents in such case files hampers this core task.

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7 The significance of the Commission's leniency programmes and our fight against cartels can be illustrated by the fact that as a rule one or more companies seek the benefit of leniency in any of DG COMP's investigations. Those contributions are often crucial in providing evidence of the infringement. In some 2/3 of investigations a voluntary application for immunity actually triggers the investigation. This is to stress the importance of the Leniency Programme as an investigative tool.

ANNEX II

ACCESS REQUESTS TO DG COMP

	2004	2005	2006	2007
State Aid	265	277	357	220
Antitrust	86	107	161	177
Mergers	27	36	39	46
Others	1	0	83	17
Total	379	420	640	460
Percentage of all requests to Commission	14.68%	12.7%	9.4%	n/a

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